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No. 211

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

LINCOLN MILLS OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 31, 1956.

OPINIONS BELOW

The District Court did not issue an opinion. Its Findings of Fact and Conclusions of Law (R. 77-81) are set forth at pp. 77-81 of the record. The opinion of the Court of Appeals, which is reprinted in Appendix B hereto, pp. 19-40, is reported in 230 F. 2d 81.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1956. (R. 131). On April 19, 1956, an order extending the time for filing a petition for certiorari until June 29, 1956, was entered by Mr. Justice Burton. The jurisidiction of this Court is invoked under 28 U.S.C. § 1254(1).

SEC. 13. When used in this Act, and for the purposes of this Act—

* * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintainng, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

QUESTIONS PRESENTED

1. The ultimate question presented by the decision of the Court of Appeals is whether a federal district court has authority, in a suit brought by a union under § 301(a) of the Labor-Management Relations Act, 1947, to compel compliance by an employer with his contract to arbitrate disputes arising under the collective agreement with the union.

2. Subsidiary questions, involved in determination of this ultimate question, are:

(a) Whether the court has jurisdiction over the suit under § 301(a).

(b) Whether the Norris-LaGuardia Act prevents the granting of the relief sought.

(c) Whether reference is to be made to state or federal law to determine the enforceability of contracts to arbitrate.

(d) Whether § 301(a) itself, in the content of the Labor-Management Relations Act, makes such contracts enforceable in the Federal Courts.

(e) Whether the United States Arbitration Act (9 U.S.C. §§ 1-14) is applicable and, if it would be otherwise applicable, whether a collective bargaining agreement is excluded from its coverage as a "contract of employment."

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, with-

APPENDIX B

In the United States Court of Appeals
For the Fifth Circuit

No. 15697

LINCOLN MILLS OF ALABAMA,
Appellant,

versus

TEXTILE WORKERS UNION OF AMERICA, CIO,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(January 31, 1956.)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Lincoln Mills of Alabama, the defendant below, is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and hence subject to Federal legislation relating to labor. Textile Workers Union of America, CIO, the plaintiff below, is an unincorporated association and labor organization. We will refer to the parties, for brevity and clarity, as Employer and Union.

In chronological sequence, the facts from which this controversy developed were as follows:

A written collective bargaining agreement between the Union and the Employer was executed June 27, 1953, to continue until July 3, 1954, and for one-year terms thereafter unless written notice of termination should be mailed by either party to the other sixty days prior to the end of the current term, in which event the agreement would terminate at the end of the current term. Article VIII of the agreement set up procedures to be followed in the adjustment of grievances, and provided that if a grievance had not been adjusted by the Article VIII procedures within the time specified,

out respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, and of the Norris-La Guardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) are set forth in Appendix A (*infra*, pp. 15-18).

STATEMENT

The petitioner, Textile Workers Union of America (hereinafter referred to as the Union), is a labor organization representing the employees of the respondent, Lincoln Mills of Alabama (hereinafter referred to as the Company). Lincoln Mills is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947.

In June, 1953, the parties entered into a collective bargaining agreement. This agreement covered wages, hours and other conditions of employment. In addition, it established a four-step grievance procedure under which any dispute "arising from the operation or interpretation of this Agreement" was to be processed (R. 21). The fourth step of this procedure was arbitration.

The Agreement provided that any "dispute between the Union and the Employer arising from the operation or interpretation of this Agreement which pertains to wages, rates or pay, hours of work or other conditions of employment which has not been satisfactorily adjusted" in the earlier steps of the grievance procedure could be submitted to arbitration by either party. The party desiring arbitration simply notified the other party within a specified time limit. Then, under the agreement, the parties were to confer and endeavor to agree upon the selection of an arbitrator. In the event of failure to agree, an arbitrator was to be chosen, by a pre-arranged method, from a list to be supplied by the American Arbitration Association. As a counterpart

to this grievance and arbitration procedure, the contract also contained an agreement that such procedures were adequate for fair and final determination of all grievances and that there should be no strikes, work stoppages or intentional slow-downs. (R. 23-24).

On June 23, and 24, 1954, 10 separate grievances were filed by the Union relating to the operation or interpretation of the collective bargaining agreement. These grievances were processed through the various steps of the grievance procedure set forth in the Agreement. They were finally denied by the Company in the third step of the grievance procedure on July 14, July 15 and July 22, 1954. The collective bargaining agreement had expired, pursuant to notice given under its terms, on July 3, 1954. (R. 78).

The Union requested the Company to submit the grievances to arbitration, as provided for in the collective bargaining agreement. The employer refused. (R. 79). The Union thereupon brought this suit against the Company asking for an order directing the Company to perform its obligation to arbitrate and asking, in addition, for damages.

The Company conceded the facts (R. 74) substantially as set forth above, and defended on two principal grounds: (1) that the contract had expired and hence the agreement to arbitrate could no longer be enforced, and (2) the court was without jurisdiction to grant the relief requested.

The District Court on April 29, 1955, issued its findings of fact and conclusions of law. (R 77-81). The Court concluded that it had jurisdiction and that the Union had a right to maintain an action to compel arbitration by virtue of the provisions of Section 301(a) of the Labor Management Relations Act of 1947. The expiration of the collective bargaining agreement, the Court held, did not relieve the Company of its obligation to arbitrate, particularly in view of the fact that the grievances were in fact processed up to the point of arbitration after the expiration of the Agreement. With respect to the claim for damages, the Dis-

trict Court held that the Union had not proven any damages and was not entitled to recover.

On the basis of these findings and conclusions, the District Court ordered the Company to comply with the arbitration provisions of the collective bargaining agreement (R. 81).

On appeal, the Court of Appeals reversed by a 2-1 vote, the opinion for the majority (R. 99, Appendix B *infra*, pp. 19-30) was delivered by Judge Jones, with Judge Rives concurring and the dissent (R. 115, Appendix B *infra*, pp. 30-40) by Judge Brown.

All of the judges were agreed that the District Court had jurisdiction over the suit under Section 301(a). They were also agreed that the Norris-LaGuardia Act did not prevent the issuance of the order which had been entered by the District Court.

The majority held, however, that in a suit brought under Section 301 an executory agreement to submit disputes to arbitration would not be specifically enforced in the absence of a showing that such agreements were specifically enforceable in the courts of Alabama. In reaching this conclusion, the majority first held, in agreement with the Fourth Circuit, and in disagreement with the Third and Sixth Circuits, that the U. S. Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. It then proceeded to consider whether Section 301(a) itself could be regarded as providing a basis upon which such agreements could be enforced. In the light of the opinions of the justices of this Court in the *Westinghouse* case, 348 U.S. 437, the majority concluded that Section 301(a) was procedural only and created neither a substantive right nor a substantive remedy.

Finding that neither the Federal common law nor the common law of the State of Alabama authorized the specific enforcement of agreements to arbitrate, the Court concluded that there was no basis upon which it could enforce

such an agreement in this case. In view of that holding, it expressly waived consideration of the question of whether the agreement to arbitrate could otherwise be enforced after the termination of the Agreement.

Judge Brown in his dissent assumed, with the majority, that Alabama would not specifically enforce an agreement to arbitrate. He also assumed that the United States Arbitration Act was not available to supply a federal remedy. He argued, however, that the injunctive relief sought was both common and traditional and that, in the light of the plain congressional policy in favor of arbitration in labor matters, Section 301 should be read as giving the Federal District Courts the traditional power to enforce compliance with a contractual commitment. He came to this conclusion, both in light of the entire network of Federal labor relations law, with its emphasis on the desirability of using voluntary arbitration as a substitute for industrial conflict, and by using Section 301 "in a modified substantive way". "The agreement to arbitrate," he said, "for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which § 301 sought to answer. If it is not available here, then nought is left of § 301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used." (R. 129; App. B *infra*, p. 40).

REASONS FOR GRANTING THE WRIT

1. There is a square conflict between the decision of the Fifth Circuit in this case and the decisions of the Court of Appeals for the First Circuit in three cases decided on April 25, 1956. *UE* v. *General Electric Co.*, 38 LRRM 2019; *Newspaper Guild* v. *Herald-Traveler*, 38 LRRM 2031; *Goodall-Sanford, Inc.* v. *Textile Workers*, 38 LRRM 2033. In all of these cases, the unions brought suit under Section

301(a) to compel performance by employers of their agreements to arbitrate disputes arising under collective agreements. The First Circuit—in unanimous opinions by Chief Judge Magruder—held, contrary to the Fifth here, that the federal district courts do have authority to compel arbitration, irrespective of state law.[1] The court's opinion in the leading case, *UE* v. *General Electric Co.*, is reproduced in Appendix C to this petition (pp. 41-62 *infra*).

The issue on which this conflict exists is plainly one of the utmost importance. Agreements to arbitrate disputes arising under labor contracts are found in a majority of contracts today. Indeed, it is not too much to say that in most labor contracts the agreement to arbitrate, and the reciprocal waiver by the union of its right to strike during the term of the contract, constitute the essential foundation of the day-to-day relationship between the parties. True, in most cases the employer's promise to arbitrate is honored rather than breached, without any need for judicial intervention. And, it may be true that a breach of the agreement to arbitrate would constitute a sufficient breach of the entire agreement to reinstate the union's right to strike. But if Section 301(a) is to be read, as Congress said it should be, as providing legal sanctions for the enforcement of the mutual obligations of unions and employers in collective agreements, then surely the enforcement of an agreement to arbitrate is one of the most important functions which that section can perform.

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[1] The *General Electric* and *Herald-Traveler* cases arose in Massachusetts. The law of that State as to the enforceability of agreements to arbitrate was found by the First Circuit to be "not at all clear". The *Goodall-Sanford* case arose in Maine. The First Circuit, in accordance with its conclusion that the federal arbitration statute was applicable, did not examine the Maine law. It appears that agreements to arbitrate are not specifically enforceable under that law. *Brown* v. *Leavitt*, 26 Me. 251, 256 (1846). See Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arbitration Journal (N.S.) 5, 13 (1953).

Indeed, if the Fifth Circuit is correct in its holding here that agreements to arbitrate cannot be enforced in suits brought by unions under Section 301, then nothing is left of Section 301 but a grant of authority to the Federal Courts to hear suits by employers against unions for damages. This court has already held, in the *Westinghouse* case, 348 U.S. 437, that Section 301 does not encompass union suits, brought in the absence of an arbitration provision, to enforce the substantive articles of a collective bargaining agreement providing benefits to the employees. If Section 301 cannot be used by a union to enforce the employer's agreement to arbitrate with it concerning disputes arising during the term of an agreement then, as Judge Magruder said in the *General Electric* case, "there would be no significant use a union could make of § 301." For all substantial purposes the statute would be re-written, in the face of its language, as authorizing suits only against unions.

2. In addition to this square conflict between the First and Fifth Circuits on the ultimate question here presented, there are additional conflicting decisions by various district courts in other circuits on the same question. The following cases from other circuits have held, on one ground or another, that an agreement to arbitrate can be enforced in a suit brought under Section 301:

(D.C. Cir.) *Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 124 F. Supp. 322 (D.C. 1954).

(2d Cir.) *Wilson Bros.* v. *Textile Workers Union,* 132 F. Supp. 163 (S.D. N.Y. 1954) appeal dismissed 224 F. 2d 176, cert. denied 350 U.S. 834.

(2d Cir.) *Local 207, UE* v. *Landers, Frary & Clark,* 119 F. Supp. 877 (D. Conn., 1954).

(3d Cir.) *Insurance Agents* v. *Prudential Insurance Co.*, 122 F. Supp. 869 (E.D. Pa., 1954) (relying on state law).

(4th Cir.) *Textile Workers Union* v. *Aleo Manufacturing Co.*, 94 F. Supp. 626 (M.D. N.C., 1950).

(6th Cir.) *U.A.W.* v. *Buffalo-Springfield Roller Co.*, 36 LRRM 2638 (S.D. Ohio, December 1954).

3. In addition to the conflict between the decision below and the decision of the First Circuit, and the district courts of other circuits on the ultimate question here, there are other conflicts between the circuits, and even within the circuits, on many of the subsidiary issues involved in the determination of that ultimate question.

(a) *Jurisdiction under § 301(a).* Both the First and the Fifth Circuit, in this case, agree that § 301(a) does grant Federal jurisdiction over the subject matter. There seems, however, to be a conflict within the Fifth Circuit itself on this question. In *International Ladies Garment Workers* v. *Jay-Ann Co.*, 228 F. 2d 632 (1956). a panel consisting of Judges Holmes and Cameron, with Judge Rives dissenting, concluded that there was no jurisdiction under Section 301 over a suit brought by a union to compel compliance with a provision in a collective bargaining agreement requiring payments to a welfare fund. The majority concluded that the proper meaning of this Court's *Westinghouse* decision was that there was no jurisdiction under Section 301 in the absence of a federal question. That decision, as Judge Brown noted in this case (Appendix B, p. 40), is squarely in conflict with the opinions of both the majority and the dissent here that the court had jurisdiction over the subject matter.

(b) *The Applicability of the Norris-LaGuardia Act.* The Fifth Circuit here, and the First Circuit in the *General Electric* case, agreed that the Norris-LaGuardia Act did

not prevent the granting of the relief sought. The relationship between the Norris-LaGuardia Act and equitable relief in suits brought under Section 301 has, however, been the source of much confusion and disagreement among other federal courts. The Sixth Circuit, in *Milk and Ice Cream Drivers* v. *Gillespie Milk Prod. Corp.*, 203 F. 2d 650 (1953) has held that the use of the word "suits" in Section 301 encompasses all varieties of suits and hence makes the Norris-LaGuardia Act inapplicable in its entirety to any injunctive proceeding brought under Section 301(a). The First Circuit, on the other hand, had earlier held that Section 301 does not modify the Norris-LaGuardia Act and that injunctive relief cannot be granted in a Section 301(a) suit in the face of the specific prohibitions of the Norris-LaGuardia Act. *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters,* 217 F. 2d 6 (1954). In the *General Electric* case, however, the First Circuit concluded that the specific interdictions of the Norris-LaGuardia Act were not applicable to a suit brought by a union to compel performance of an agreement to arbitrate.

Although no circuit has held to the contrary on this limited proposition, and the Fifth Circuit's decision here is in accord, there are, as Judge Magruder noted, two district court decisions in other circuits holding that the Norris-LaGuardia Act prevents the granting of any equitable relief in suits brought under § 301(a). *Associated Telephone Co.* v. *Communications Workers,* 114 F. Supp. 334 (S.D. Cal. 1953); *International Longshoremen's Union* v. *Libby, McNeill & Libby,* 114 F. Supp. 249, (D. Hawaii, 1953) affirmed on other grounds, 221 F. 2d 225 (9th Cir. 1955). In addition a district court in the Seventh Circuit has recently specifically held that the Norris-LaGuardia Act bars specific enforcement of an agreement to arbitrate in a suit brought by a union under Section 301(a). *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 37 LRRM 2749 (E.D. Wisc., Mar. 12, 1956).

(c) *Whether Section 301(a) Is a Sufficient Statutory Basis Upon Which to Predicate Specific Enforcement of an Agreement to Arbitrate.* Both the Fifth Circuits here and the First Circuit in the *General Electric* case are in agreement that Section 301(a) itself does not provide a sufficient statutory authorization to permit specific performance of arbitration agreements. The dissenting opinion here, however, unlike the First Circuit decision, argues that Section 301(a), in view of the federal courts' general equity powers, is sufficient to warrant the granting of such relief without need for further statutory authorization. The district court opinions from the 2d, 4th, 6th and D.C. circuits cited on pp. 8-9 *supra,* as well as several earlier district court opinions in the First Circuit,[2] agree with this position and hold—contrary to the Fifth Circuit here and the First Circuit in the *General Electric* case—that Section 301(a) itself is a sufficient statutory authority to grant specific performance of an agreement to arbitrate. And the holding of the Court of Appeals for the Second Circuit in *Shirley-Herman Co.* v. *International Hod Carriers,* 182 F. 2d 806, 809 that Section 301 "created a remedy where none existed before and provided a forum in which to enforce it" certainly is in conflict, at least in principle, with the conclusion of the First and Fifth Circuits.

(d) *Whether the United States Arbitration Act Is Applicable.* On this question the circuits are in hopeless confusion. In the instant case, the Fifth Circuit aligned itself with the Fourth Circuit in holding that collective bargaining agreements are excluded from the provisions of the U. S. Arbitration Act by virtue of the exclusion, in Section 1 of the Act, of "contracts of employment." Appendix B, *infra,* p. 26; *United Electrical Workers* v. *Miller Metal Products, Inc.,* 215 F. 2d 221 (4th Cir. 1954).

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[2] *Textile Workers Union* v. *American Thread Co.,* 113 F. Supp. 137 (D. Mass., 1953); *United Textile Workers* v. *Goodall-Sanford, Inc.,* 129 F. Supp. 859 (D. Maine, 1955).

On the other hand, the First Circuit in the *General Electric* case has joined the Sixth Circuit in holding that the exclusion of contracts of employment does not apply to collective bargaining agreements. Appendix C, *infra*, p. 60; *Hoover Motor Express Co., Inc.* v. *Teamsters*, 217 F. 2d 49 (6th Cir. 1954).

The Third Circuit actually holds to a middle position. It considers a collective bargaining agreement as a contract of employment. *Amalgamated Association* v. *Pennsylvania Greyhound Lines*, 192 F. 2d 310 (1951). But it reads the exclusion in Section 1 as applying only to such contracts covering seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. *Tenney Engineering Co.* v. *United Electrical Workers*, 207 F. 2d 459 (1953). Therefore, in the Third Circuit's view, collective bargaining agreements covering workers engaged in an industry affecting commerce, but not directly engaged in transportation, would not be excluded by Section 1 of the Arbitration Act.

Assuming that the exclusion in Section 1 is not applicable, there remain two questions under the Arbitration Act: whether the Act, apart from the exclusion, is applicable at all to collective bargaining agreements not directly involving commerce, under Section 2, and whether the provision in Section 4 authorizing specific performance of an agreement to arbitrate applies in union suits brought under Section 301(a).

Section 2 of the Arbitration Act provides, in pertinent part, that a written agreement to arbitrate "in . . . . a contract evidencing a transaction involving commerce" shall be enforceable. There is no prior judicial authority as to whether a collective bargaining agreement covering employees engaged in an industry affecting commerce is a contract "evidencing a transaction involving commerce" other than this court's decision in *Bernhart* v. *Polygraphic Co.*, 350 U.S. 198, which seems to hold that it is not.

Assuming that such an agreement is a transaction involving commerce, however, there remains the further question as to whether the United States Arbitration Act can apply to give authority to compel specific performance of an agreement to arbitrate in a suit brought by a union under § 301(a). The relevant provision here is Section 4 of the Act, which seems to authorize specific performance of an agreement to arbitrate in cases where the district court would, save for the agreement to arbitrate, have jurisdiction over the merits. This Court in the *Westinghouse* case held that § 301 does not give jurisdiction over a suit by a union to compel compliance with the provisions of a collective agreement relating to compensation. This leads obviously to the question of whether a suit to compel arbitration of such disputes can come within the scope of Section 4 of the Arbitration Act. One district court in the Third Circuit has held that, for this reason, it lacks jurisdiction under Section 4 to compel arbitration of a dispute arising under a collective bargaining agreement as to compensation to be paid to employees. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). The First Circuit, on the contrary, finds independent meaning in the promise of the employer to arbitrate and hence jurisdiction under Section 301(a), irrespective of the *Westinghouse* decision, over the union's complaint that the employer has breached that provision. And, the First Circuit concludes, the case is therefore one which falls within the terms of Section 4 of the Arbitration Act.

4. In sum, there is both conflict and confusion in the federal courts, not only as to the ultimate result reached by the First and Fifth Circuits as to whether agreements to arbitrate can be specifically enforced under Section 301(a) but also as to almost every one of the subsidiary steps in the reasoning required to hold either one way or the other on that question. The number of cases in which these questions are presented, and the variety of answers given by the

various federal courts, makes it clear that this case, even apart from the direct conflict between the First and Fifth Circuits, presents important questions of federal law which have not been, but should be, settled by this court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> SEC. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, provides, in pertinent part, as follows:

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . .

The Norris-LaGuardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) provides, in pertinent part, as follows:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking,

patrolling or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

* * *

the party presenting the grievance should be governed by the provisions of Article IX(F) of the agreement.

By Article IX of the agreement the parties agreed that the contract grievance procedures were adequate to provide a fair and final determination of all grievances arising under the terms of the agreement. The desire of the parties to avoid strikes and work stoppages was recited. Paragraphs (A) to (E) inclusive of Article IX contained "no-strike" provisions. In Paragraph (F) of Article IX, of the agreement it was provided that any disagreement or dispute, arising from the operation or interpretation of the agreement, pertaining to wages, rates of pay, hours of work or other conditions of employment which had not been satisfactorily adjusted within the time limited, might be submitted to arbitration by the giving of written notice within ten days after the expiration of the applicable time limit. It was further provided that if the parties did not agree upon an arbitrator, the American Arbitration Association should be requested to furnish the names of five qualified arbitrators and the parties should alternately strike one name each from the list until a single name remained and the person so designated should serve.

The Union filed with the Employer seven grievances on June 23, 1954, and three grievances on June 24, 1954, all of which were of the type specified in Article IX(F). The Employer followed the procedures of the agreement up to the point of rejecting the claims, the rejections being made at various dates on and subsequent to July 14, 1954. Pursuant to timely notice given pursuant to its terms, the agreement terminated on July 3, 1954. The Union requested the Employer to submit the grievances to arbitration pursuant to Article IX(F) of the agreement. The Employer refused to do so. Thereafter the Union brought this suit against the Employer asking that the Employer be required to submit the grievances to arbitration and praying for damages. The District Court declined to award damages to the Union, saying that none were proven, but decreed that the Employer submit the grievances to arbitration as provided in Article IX(F) of the agreement. Jurisdiction was found under §301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185.

Presented for our consideration are questions which may be substantive as well as procedural. Since there is no diversity of

citizenship apparent we are, at the outset, required to ascertain whether there is a basis for Federal jurisdiction. The Congress has provided that:

> "Suits for violation of contracts between employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties". Sec. 301(a) Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a).

This grant has given Federal courts jurisdiction for the consideration and determination of questions such as the one presented in this case. It has given to Federal courts the power to adjudicate, where a violation of a contract is asserted, causes of action between employers and labor organizations and to determine whether or not a cause of action exists in a particular case. It does not follow, though, from the existence of the judicial power to determine a cause of action or controversy that the right asserted has legal sanction. It does not follow from the grant of jurisdiction to hear a litigant in a Federal forum that rights have been created or remedies provided which are denied to others. That there is a right to seek relief in a Federal court does not mean that the relief sought is necessarily available. More specifically, our question is whether Section 301, taken in context, requires or permits the enforcement of an executory covenant for the submission to arbitration of grievances pursuant to a collective bargaining agreement between a union and an employer.

The provisions of the contract between the parties to this appeal from which spring the problems presented are not novel, yet we do not find that the precise point presented has heretofore been considered by an appellate court. In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced. *Red Cross Line v. Atlantic Fruit Co.*, 1924, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. *Tejas Development Co. v. McGough Bros.*, 5th Cir. 1947, 165 F. 2d 276. Such is the rule as found by the framers of the Restatement of the Law. Restatement contracts, §550 (1932). The Supreme Court of Alabama, announcing the rule has said:

"The Courts are almost unanimous in declaring that equity will not decree specific performance of a contract to submit a cause to arbitration, while it will, in proper cases, entertain a bill to enforce an award." Ex parte Birmingham Fire Ins. Co. 1937, 223 Ala. 370, 172 So. 99.

If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress. The Norris-LaGuardia Act, 29 U.S.C.A. §§101, et seq., does not preclude the granting of the relief sought. *Graham v. Brotherhood of Locomotive Firemen and Enginemen,* 1949, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The United States Arbitration Act expressly provides that nothing therein "contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. §1.

In Section 2 it is said:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." July 30, 1947, c. 392, §1, 61 Stat. 669. 9 U.S.C.A. §2.

Section 3 of the Arbitration Act provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C.A. §3.

The Arbitration Act also provides that courts of the United States may direct arbitration in accordance with the terms of written agreements. 9 U.S.C.A. §4.

The Court of Appeals of the Third Circuit has had a number of occasions to consider the application of the Arbitration Act to collective bargaining agreements, and we cannot reconcile its views as expressed in its several opinions. It first held that the stay of proceedings provisions in Section 3 of the Act applied in a class suit for unpaid over-time compensation claimed under the Fair Labor Standards Act, 29 U.S.C.A. §§201 et seq. *Donahue v. Susquehanna Collieries Co.,* 3rd Cir. 1943, 138 F. 2d 3, 149 A.L.R. 271. Section 1 of the Arbitration Act, containing the exclusion clause was set forth in a footnote but was not mentioned in the opinion. The Donahue case, *supra,* was followed in *Watkins v. Hudson Coal Co.* 3rd Cir. 1945, 151 F. 2d 311 cert. den. 327 U.S. 777, 66 S. Ct. 522, 90 L. Ed. 1005, where it was said that the exclusion clause of Section 1 was not an over-all limitation. On a second appeal of the Donahue case a stay of proceedings was directed pursuant to Section 3 until arbitration was had. *Donahue v. Susquehanna Collieries Co.,* 3rd Cir. 1947, 160 F. 2d 661. The same result was reached in *Evans v. Hudson Coal Co.* 3rd Cir. 1948, 165 F. 2d 970. Before the next consideration of the question by the Third Circuit, Congress had reenacted the United States Arbitration Act and had included in the reenactment the following catch line of Section 1, " 'Maritime Transactions' and 'Commerce' Defined; Exceptions to Operation of Title". Act of July 30, 1947 (H.R. 2084), ch. 392, 61 Stat. 669. This, thought the court, in the next case before it, indicated a congressional intent that the exclusion in Section 1 applied to the entire Act, and it was held that collective bargaining agreements were "contracts of employment" within the meaning of the Act. *Amalgamated Ass'n, etc. v. Pennsylvania Greyhound Lines,* 3rd Cir. 1951, 192 F. 2d 310. This was followed in *Pennsylvania Greyhound Lines v. Amalgamated Ass'n,* 3rd Cir. 1951, 193 F. 2d 327.

In the most recent of the Third Circuit cases which we have noted, it was said by a divided court that a collective bargaining agreement between an employer producing goods for subsequent sale in interstate commerce, as is the employer in the case before us, and a union, is within the meaning of a contract in an "in-

dustry affecting commerce" as used in Section 301 of the Labor Management Relations Act of 1947, but that such a contract is not one of "employment of . . . workers engaged in foreign or interstate commerce" within the exclusion clause of Section 1 of the Arbitration Act. A majority of the court reconciled the decision with the prior holdings by saying that the two Pennsylvania Greyhound Lines cases involved employees engaged in interstate transportation, excluded by Section 1, and that the other earlier cases involved employees producing goods for subsequent resale in commerce, and not covered, said the court, by the exclusion clause. Two of the judges thought that collective bargaining agreements were not "contracts of employment" within the purview of Section 1 of the Arbitration Act, and were of the belief that the Pennsylvania Greyhound Lines cases should be expressly overruled. Two judges dissented. The court directed the granting of a stay pending arbitration. *Tenney v. United Electrical R. & M. Workers,* 3rd Cir. 1953, 207 F. 2d 450.

The Fourth Circuit departs from the Third Circuit and has held that the Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. Speaking for the Court and referring to Section 1 of the Arbitration Act, Chief Judge Parker has said:

> "Art. 1 of that Act of February 12, 1925, c. 213, as reenacted by the Act of July 30, 1947, c. 392, 9 U.S.C.A. §1, contains nothing but definitions of 'maritime transactions' and 'commerce' and an excepting clause; and we think it clear that the excepting clause was intended to apply to the entire act." *International Union v. Colonial Hardwood Floor Co.,* 4th Cir. 1948, 168 F. 2d 33.

The Colonial Hardwood case was followed in *United Electrical R. & M. Workers v. Miller Metal Products,* 4th Cir. 1954, 215 F. 2d 221.

It seems to us that the Sixth Circuit originally reached the same conclusion as had been pronounced in the Fourth. In a well reasoned opinion by Judge Hamilton wherein the first Donahue case, *supra,* is criticized, it is said:

> "The scope of the exception or proviso in the statute must be gathered from the view of the whole law, and if the

language of the exception is in perfect harmony with the general scope of the entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce. Section 2 of the Act makes valid and irrevocable all arbitration agreements in writing to submit to arbitration future controversies arising out of the contract of which the arbitration agreement was a part. It would be senseless to say that the exclusion from the Act covers the validity of the contract, but excludes the stay provision of Section 3. The reason for the exclusion is applicable to the entire Act. The language of the exclusion 'herein contained' is found in the first section of the Act. This section is made up entirely of definitions and exceptions to the operation of the title. 'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used. The fact that it was used in the present Act in a section where none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act and not to any given section. There can be no doubt that the contract in issue is a contract of employment. Appellant insists that the exception relates only to the subject specified in the title. If we give full weight to appellant's contention, its argument must fail because the title not only states that its purpose is to make valid arbitration contracts but also to make them enforceable. Section 3 sets up one of the methods of enforcement." *Gatliff Coal Co. v. Cox*, 6th Cir. 1944, 142 F. 2d 876.

But in a later case from the Sixth Circuit the court notes the conflicts. It adhered to its earlier view that the exclusion proviso of Section 1 of the United States Arbitration Act applies to the entire act, but it held that the collective bargaining agreement before it was a trade agreement and not a "contract of employment" within the exclusion clause. *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc.*, 6th Cir. 1954, 217 F. 2d 49.

As to the effect of the United States Arbitration Act in the case

before us, we align ourselves with the Fourth Circuit and hold that the collective bargaining agreement before us is a "contract of employment" within the meaning of the Arbitration Act and as such is excluded from the application of the act by its express terms. The earlier cases and their effect are commented upon in 17 Law and Contemporary Problems 580, and 65 Harv. L. Rev. 1238. Though the Norris-LaGuardia Act does not preclude, the United States Arbitration Act does not authorize the judicial enforcement of a contractual undertaking to submit to arbitration grievances arising under a collective bargaining agreement.

This brings us to the question of whether Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a), herein before quoted, provides for the enforcement of a provision for arbitration contained in a collective bargaining contract between an employer and a labor organization of employees engaged in producing goods for subsequent sales in interstate commerce. The Court of Appeals of the Tenth Circuit has given us, as dictum perhaps, a succinct answer to the query. It said:

> "This statute [29 U.S.C.A. §185(a)] is for the purpose only of giving jurisdiction to the federal courts in cases involving labor contracts. It does not give the federal courts any different or additional power than a state court would have if the action had been brought there". *Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO,* 10th Cir. 1951, 187 F. 2d 980.

In a decision from the Second Circuit it is stated:

> "But § 301 . . . created a remedy where none existed before and provided a forum in which to enforce it." *Shirley-Herman Co. v. International Hod Carriers, etc.,* 2d Cir. 1950, 182 F. 2d 806, 17 A.L.R. 2d 609.

In the Shirley-Herman case the remedy to which reference was made as being created by the statute was the right to sue a labor union as such and the right of unions to bring and maintain judicial actions. We think it unnecessary to consider other decisions of the Courts of Appeal or enter upon a review of District Court cases, of which there are a number. The answer to this phase of our inquiry is to be found, we think, in the opinions of the Supreme

Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 1955, 348 U.S. 437, 75 S. Ct. 488, 99 L. Ed. (Advance p. 368).

Perhaps it cannot fairly be said that the ratio decidendi of the Westinghouse case is more than that a Federal District Court does not have jurisdiction under Section 301 over an action brought by a union against an employer under a collective bargaining agreement on behalf of employees for wages which the employer refused to pay and which refusal the union asserted was in violation of the agreement. But in the several opinions we find a guide for our decision. Mr. Justice Frankfurter, with whose views Justices Burton and Minton concurred, found that if the "plain meaning" rule of construction could be applied, then all Section 301 does is to give procedural directions to the Federal courts to treat labor unions as natural or corporate persons in actions involving collective bargaining agreements, and to do so regardless of the amount in controversy and not to require diversity of citizenship. In considering the intent of Congress, Mr. Justice Frankfurter found that its aim was to open the Federal Courts to such suits solely because they were between the union and employers, but without providing any Federal law other than procedural for such suits. "It was evident", said Mr. Justice Frankfurter, "that the specific desire was to remove procedural obstacles, to suit by and against the union." He quoted Senator Taft, in proposing an amendment approximating §301, as saying:

> ". . . All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question."

A question was raised by Mr. Justice Frankfurter as to whether the construction dictated by the "plain meaning rule" and by the intent of Congress could be placed within the constitutional restriction of Federal jurisdiction to cases arising under the Constitution and laws of the United States, etc. U.S. Const. Art. III, §2. It was necessary, thought Mr. Justice Frankfurter, to limit the scope of the Act as "doubtful legislation". The Court of Appeals, in its consideration of the Westinghouse case, had proceeded upon the so-

called "electric theory" that the collective bargaining agreement is not of itself a contract of hiring, that each employee makes with the employer a separate contract of hiring from which stems the obligation to pay wages, and that, while Section 301 creates "a federal substantive right", there is jurisdiction only of causes of action between a union and an employer. Since the Court of Appeals did not regard a breach of the obligation to pay wages as creating a cause of action in the union, it rejected Federal jurisdiction. *Association v. Westinghouse Electric Corp.* 3rd Cir. 1954, 210 F. 2d 623. Mr. Justice Frankfurter disagreed with the Court of Appeals, and indicated his view to be that no new federal law concepts of contractual interpretation were intended by the enactment of Section 301.

Mr. Chief Justice Warren, joined by Mr. Justice Clark, concurred and were of the opinion that it was enough to say that Section 301 was not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the right of an employee to receive wages; and being of such opinion they saw no reason to make labor policy or raise constitutional issues. Mr. Justice Reed also concurred in the result. He took the position that it was the intent of Congress to give federal jurisdiction over actions arising from breaches of collective bargaining agreements whether the rules of substantive law are derived from federal or state sources. He concluded, as did the Court of Appeals, that a breach of the duty to pay wages was a violation of an individual employment contract and not of the collective bargaining agreement.

In a dissenting opinion in the Westinghouse case, Mr. Justice Douglas, with whom Mr. Justice Black concurred, there was disagreement with the majority refusal to permit the Union to bring the suit. The minority did; however, concur in the view of Mr. Justice Reed that Congress "created federal sanctions for collective bargaining agreements, made cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for the construction and interpretation of those collective bargaining agreements".

We have, in the case before us, a complaint by the Union that the Employer has breached a provision of a collective bargaining

agreement. Out of such complaint arise a case and controversy of which the Federal courts have jurisdiction under the Constitution as implemented by Section 301. And see 28 U.S.C.A. §1337. But it does not follow that because jurisdiction is given to Federal courts, there is a new federal law concept that authorizes the courts to enforce submission to arbitration. Before such a result is reached, we must find a rule of law derived from state or Federal sources. We do not think it matters whether a right to enforce submission to arbitration is or is not substantive, as was considered in *Bernhardt v. Polygraphic Company of America,* 2nd Cir. 1954, 218 F. 2d 948; or whether as said by Mr. Justice Brandeis, there is "the substantive right created by an agreement to submit disputes to arbitration", which he said "is recognized as a perfect obligation." *Red Cross Line v. Atlantic Fruit Co.,* 1924, 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582.

Finding nothing of Federal origin or in the laws of Alabama, of either common law or statutory enactment, or from any other source, that requires or permits, or from which we might, in the language of Mr. Justice Douglas, fashion a rule requiring or permitting, the enforcement of the covenant for arbitration of grievances, and concluding that Section 301 does not of itself provide or furnish the source for such a rule, we hold that there is no legal right to the relief sought.

In the determination of the case before us, it was held that, since the grievances arose while the collective bargaining agreement was in effect, the Employer was required to arbitrate such grievances subsequent to the termination date of the agreement. Although unwilling to adopt the most recent conclusions of the Third Circuit in construing the United States Arbitration Act, we are impressed by its views with respect to the effect of the termination of a collective bargaining agreement upon Section 301 procedure. After reciting the giving of notice of termination and the failure of negotiations toward a new contract between an employer and a union, the court said:

> "The old contract thereupon terminated pursuant to the permitted election already made manifest by timely notice as provided in the document itself. The obligation not to strike, like the other obligations of the contract ceased to exist. For this reason the complaint was properly dismissed". *Paterson*

Parchment Paper Co. v. International Brotherhood, 3rd Cir. 1951, 191 F. 2d 252.

Finding as we do that compliance with a covenant for arbitration in a collective bargaining agreement will not be compelled by a Federal court judgment where the courts of the state would deny such relief, it follows that there was no enforceable right which could have been either retained or lost upon the termination of the agreement. Hence we need not and do not decide whether such a covenant would survive where, under the applicable law, such a provision might have been enforced during the term of the agreement.

It is the view of this Court that the District Court erred in not sustaining the defendant's motion to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted. Therefore, with a direction to sustain the motion to dismiss, the judgment appealed from is

REVERSED.

BROWN, Circuit Judge, dissenting:

The majority declares plainly that the District Court had jurisdiction. It does that on the basis of §301. With this I am in complete agreement. But applying the rationale of Mr. Justice Frankfurter's opinion as though it was all that was said by a court of eight, §301 is confined rigorously to the procedural concept. Finding neither state nor federal statute (apart from §301) authorizing injunctive enforcement of the agreement to arbitrate, the majority concludes that the court with power is yet powerless to proceed—it has power but no tools—in short, the door is opened but the hall is empty. I decline to believe that power is so sterile or that §301, if needed to bridge any gaps, exhausts itself by opening the door.

On jurisdiction I would spell out what seems implicit in the majority opinion: This is, on all tests, a *union* controversy in which the union is asserting in its collective capacity a demand relating to all of the employees as a group, on the one hand, and the employer, as such on the other. It is not the assertion, through name or guise of the union, of a single claim for one or the aggregation of many single claims for all arising under the individual contracts of employment, as such, between employee and employer. Ar-

bitration, as the last step in the grievance machinery, is in explicit terms the undertaking[1] of union and employer, and by its nature, its force and hence effectiveness, is derived from employer and union pledging that each will be bound. It is, we all agree,[2] therefore a case for §301.

What law was then to be applied? Side-stepping the engaging prospect of divining the mathematical probabilities of decision on this point amongst Justices splitting on a 3-2-1-2 combination, the court determines that under neither Alabama nor Federal law is there a right to enforce arbitration.

I am willing here to accept this cautious approach and assume that Alabama[3] will not specifically enforce an agreement to arbitrate and that the United States Arbitration Act, 9 U.S.C. 1, is not

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[1] Article VIII prescribes the steps. In Step 1 between Room Steward and department Overseer, Step 2 General Shop Committee and Mill Superintendent, the aggrieved employee may, "in his discretion" accompany the union representatives; but in Step 3 between the union and a representative of Employer's executive management and in Step 4 (adopting arbitration under IX(F)), it is strictly between union and employer.

Article IX(A) states: "The employer and the union agree that the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances * * *. It is the desire of the Union and the Employer to avoid strikes and work stoppages." Sub-paragraphs (B), (C), (D) and (E) contain a precise set of rules for the consequences of strikes, wildcat strikes, slowdowns, and other stoppages in disregard of the agreement to exhaust grievance machinery, including arbitration.

Sub-paragraph (E) makes it clear that both parties thought this was a §301 contract as the employer releases the union from liability for damages on the part of the union, its officers, agents or members "for breach of contract of any kind or character whatsoever" in consideration of the union's agreement to make the grievance machinery effectual.

[2] Our case International Molders etc. v. Western Foundry Company No. 15235 decided March 30, 1955 (remanded, per curiam, to dismiss for lack of jurisdiction), certiorari denied November 7, 1955, 24 Law Week 3126, applied *Westinghouse* to claim by union for wage increases due employees; Ferguson-Steere Motor Co. v. International Brotherhood etc., 5 Cir., 223 F. 2d 842, held that §301 could not be used to by-pass the National Labor Relations Board.

[3] Alabama may be reluctant as to remedy but not as to general validity. Alabama's constitution and statutes contain provisions indicating a public policy favorable to arbitration in general and spelling out in detail a system and procedure of arbitration. Code of Alabama, Constitution of 1901, Article 4 §84; Code of Alabama Title 7 §829 (formerly 2908) thru §844 (formerly 2923). §844 states that the statute is cumulative rather than restrictive, but §829, 830, and 831 may indicate that the statute and public policy are limited to agreements to arbitrate specific disputes already arisen and do not comprehend agreements for arbitration of future disputes. See Headley v. Aetna Insurance Co., 202 Ala. 384, 80 So. 466, 467; Ex parte Birmingham Fire Insurance Co. (Sup. Ct. Ala.) 172 So. 99, 101; Caldwell v. Caldwell, 157 Ala. 119, 47 So. 268, 269.

available[4] or effective to supply the federal statutory mechanics for arbitration.

But the studied search for a federal statute, the painstaking analysis of the cases under it, demonstrates, I think, a misconception of the fundamentals. It is as though we were dealing with a court having statutory power only. But that is not the case. The United States District Court is a constitutional organ with the intrinsic capacity to grant traditional coercive relief as the cause over which it has jurisdiction may require. *Williamson v. Berry,* 8 How. 495, 536, 12 L. Ed. 1170, 1187, "Jurisdiction in chancery is inherent and original, comprehending now almost every exigency of human disagreement, for which there is not an adequate remedy at law."

Judge Goodrich in the recent opinion in *Johnson, Warden v. Marsh,* No. 11713 (November 30, 1955) . . . F. 2d . . . not yet reported, finding ample inherent power to grant bail even though no statute can be found described both this full power to act once the court acquires jurisdiction [here by virtue of §301] and the basic misconception that the district court can do only that which some statute permits:

> "The statement is often made that the inferior courts of the United States are courts of limited jurisdiction. This is a truism in one sense. These courts are competent to act in such cases, and only in such cases, as the Congress, pursuant to the Constitution, assigns to them. And unless constitutional provisions stand in the way, the assignment may be varied at the will of Congress. But within the area of activity assigned to them, Federal courts are courts of full stature, and we may rightly look to common law concepts and precedents to see the scope of the implied or 'inherent' authority which the judicial office carries with it. * * * We believe that the basic misconception in those decisions denying

[4] See, The Federal Enforcement of Labor Arbitration Agreements, Seymour Phillip Kaye, New York University Sixth Annual Conference on Labor, 1953, p. 207, a detailed discussion of this problem and legislative history of the Arbitration Act; Legal Aspects of Labor Arbitration, Lee Epstein, New York University Second Annual Conference on Labor, 1949, p. 383 at 388; Labor Arbitration—The Arbitrable Issue, Ralph E. Kharas, Fifth Annual Conference on Labor, 1952, pp. 633, 637, 638; Legal Status of Labor Arbitration, Jesse Freidin, New York University First Annual Conference on Labor Law, 1948, 233, 247, 251.

this authority lies in their view that since Federal courts have limited, statutory jurisdiction, their powers in proceedings involving this jurisdiction are necessarily limited and must be statutory. See Principle v. Ault, 62 F. Supp. 279, 282 (N.D. Ohio 1945). This, as already indicated, is not our view of the matter."

The remedy sought here is common and traditional—the equity injunction to compel or restrain action because of the inadequacy of the usual money damage. Its availability need find no source, as such, in specific statute. Indeed, it has been the frequent instrument of effectual sanction for enforcement of the policy of statutes.[5] Since power is present and a traditional tool is available and effective, is there an obstacle to their full use? There is clearly no statutory[6] proscription, and an accurate treatment of

[5] The equity injunction has been a potent weapon to effectuate declared policy in the field of labor relations against severe attacks that the statute reflecting such policy [here it would be the Taft-Hartley Act] was silent on such sanction: Texas & New Orleans Railroad Company v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548; 74 L.Ed. 1034; Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 551, 81 L.Ed. 789, 801, "In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace." Steele v. L. & N. Railroad Co., 323 U.S. 192, 89 L.Ed. 173; Tunstal v. Brotherhood of L.F&E., 323 U.S. 210, 89 L.Ed. 187; Graham v. Brotherhood of L.F.&E., 338 U.S. 232, 94 L.Ed. 22; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 96 L.Ed. 1283.

See for other statutes: United States v. F. O. Morgan, 307 U.S. 183, 194, 83 L.Ed. 1211, 1218, 1219; Porter v. Warner Holding Company, 328 U.S. 395, 398, 90 L.Ed. 1332, 1336, 1337; Hecht Co. v. Bowles, 321 U.S. 321, 329, 331, 88 L.Ed. 754, 760, 761; Federal Power Commissioner v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 500, 93 L.Ed. 1499, 1502; Federal equity court grants or withholds its injunction to effectuate public policy, Hurd v. Hodge, 334 U.S. 24, 34, 35, 92 L.Ed. 1187, 1195.

This power to use a traditional federal equity remedy is so pervasive as to be available in diversity actions where, in a comparable situation, the local state court would not, or could not, grant equitable relief: see Guaranty Trust Co. v. York, 326 U.S. 99, 106, 89 L.Ed. 2079, 2084, 2085.

Federal equity court has great flexibility in molding relief in cases over which it has jurisdiction with all powers of the Court of Chancery: Sprague v. Ticonic National Bank, 307 U.S. 161, 164, 165, 167, 83 L.Ed. 1184, 1186, 1187; Barber v. Barber, 21 How. 582, 592, 16 L.Ed. 226, 229; it could hardly have this wide capacity were it required to find statutory basis for the remedy, its availability or use.

See also following which affirm an inherent power in a Federal Court to act: Wright v. Henkel, 190 U.S. 40, 63, 47 L.Ed. 948, 956; United States v. Hudson and Goodwin, 7 Cranch 32, 34, 11 U.S. 21, 23, 3 L.Ed. 259, 260; United States v. Shipp, 203 U.S. 563, 572, 573, 51 L.Ed. 319, 323.

[6] We are in accord that Norris-LaGuardia Act, 29 U.S.C. 101, does not

historical precedent reveals no self-generated decisional policy against its use. Despite the flood of words that ordinarily executory contracts to arbitrate will not be specifically enforced, this reflects no federal policy of hostility to arbitration as such. On the contrary, arbitration is given enthusiastic federal sanction[7] and where a general Congressional policy is plainly indicated that such a mechanism will be useful in effecting its legislative aim, equity has the power, and the right, in the public interest, to make arbitration effective.[8]

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forbid relief here. See also Textile Workers Union v. American Thread Co., D.C. Mass., 113 Fed. Supp. 137; Local 207 v. Landers, D.C. Conn., 119 Fed. Supp. 877; Milk and Ice Cream Drivers v. Gillespie Milk Products Corp., 6 Cir., 203 F. 2d 650; Textile Union of America v. Aleo Mfg. Co., D.C.N.C., 94 Fed. Supp. 626; United Textile Workers v. Goodall Sanford, D.C.Me., 131 Fed. Supp. 767. Contra: Mead v. International Brotherhood, 1 Cir., 217 F. 2d 6.

[7] The federal approach has not been that of many jurisdictions which, with jealous eye, scanned all such devices lest they infringe upon or oust the courts from their historic role. Judge Hough, in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd., S.D.N.Y., 222 Fed. 1006, 1007, characterized it: "* * * A more unworthy genesis cannot be imagined." See Mr. Justice Story's comments from Tobey v. Bristol County, Fed. case No. 14065 quoted footnote 1 Red Cross Line v. Atlantic Fruit Co. 264 U.S. 109, 120, 68 L.Ed. 582, 585, and Mr. Justice Brandeis continued: "But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. Hamilton v. Home Ins. Co., 137 U.S. 370, 385, 386, 34 L.Ed. 708, 713 * * *. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity. Karthaus v. Yallas Y. Ferrer, 1 Pet. 222, 7 L.Ed. 121; Burchell v. Marsh, 17 How. 344, 15 L.Ed. 96; Bayne v. Morris, 1 Wall. 97, 17 L. Ed. 495. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. Hecker v. Fowler, 2 Wall. 123, 17 L.Ed. 759."

The court in Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277, 76 L.Ed. 282, 290, sustaining the United States Arbitration Statute characterized compulsion of arbitration as "one of remedy only."

[8] Virginia Railway Co. v. System Federation No. 40, supra, at 552, "* * * The peaceable settlement of labor controversies, * * * is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved * * *. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol County (C.C.) 3 Story, 800, Fed. Cas. No. 14,065, supra, enforce statutes commanding performance of arbitration agreements. Red Cross Line v. Atlantic Fruit Co. * * *; Maritime Transit Co. v. Dreyfus * * *."

Clearly, arbitration is a welcome device to Congress. Indeed, the Arbitration Act itself, 9 U.S.C. 1, reflects a determination that the needs of the business and industrial world would be aided by giving procedural certainty and greater vitality to the use of voluntary non-court means of settling disputes. The express exclusion of "contracts of employment" is no left-handed, reverse reinstatement of the ancient attitude of hostility—"contrary to public policy." Rather, the difficulties encountered by the Third, Fourth and Sixth Circuits in attempting to adapt that statute to the field of labor problems covered so long by special legislation bespeaks, perhaps, a Congressional prescience.

But Congress has been much more direct in its blessing. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, is a detailed framework of voluntary conciliation and mediation with arbitration awards being final, binding and legally enforceable.[9] This same scheme is duplicated for airline carriers, 45 U.S.C. 181, *et seq.* Moreover, the Labor Management Relations Act of 1947 contains the positive declaration that it is the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation * * * can most satisfactorily be secured * * *" by settlement of issues between employers and employees by conciliation, mediation, and voluntary arbitration. This is stated, not alone in categorical terms, 29 U.S.C. 171 through 178, but the public interest is so direct that the statute establishes the Federal Mediation and Conciliation Service, an independent agency, as an arm of the Government operating at public expense.[10]

In every modern piece of labor legislation, the Congress has

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[9] The Adjustment Boards, §153, are in reality bipartisan arbitrations whose awards are final, 153 First (m) and enforceable within two years by court petition (p) (q); §157 provides for arbitration of disputes not settled by mediation or Board of Adjustment under §§151-156, and under §158 (1) awards are binding, are filed (k) in the Federal District Court where, under §159 the award is conclusive and on which the court shall enter judgment unless set aside for one of three limited, specific grounds.

[10] Governmental assistance through the Mediation Service is specifically directed to settlement of differences by mutual agreement through conference, collective bargaining, "or by such methods as may be provided for in any applicable agreement for the settlement of disputes" (§171); this is spelled out further in 173 (d), "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and

either directed the establishment of arbitration systems or has recognized the essential desirability of their existence with the full force of the Government, its prestige, and its treasury behind them as an essential device for maintenance of industrial peace. In such an atmosphere it contradicts all that Congress has done to resurrect the bones of an ancient day to find some supervening notion that arbitration agreements, while tolerated to the point of acceptance once completed, are inherently evil and beneath the claim of right which the Chancellor will affirmatively protect.

The power exists over parties and cause by §301. The remedy sought is traditional, common and effective. There is no policy against its use and there is overwhelming evidence of a Congressional purpose to encourage, facilitate and make effectual all of the collective processes of bargaining, conciliation, mediation and arbitration. On this approach it is the use of the federal power, a federal remedy to effectuate a federal policy. There is no need to draw upon state jurisprudence with the constitutional uncertainties involved.

Moreover, this gives a cohesive consistency to the total federal labor picture. Federal constitutional power is amply present under this very Labor Management Relations Act to require employer and employees to bargain in good faith on the inclusion[11] of an agreement to arbitrate in the bargaining contract and to is-

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mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

See, Legal aspects of Labor Arbitration, Epstein at p. 389, cited footnote 4 *supra;*

Forkosch, Treatise on Labor Law, 1953, 476-488, in a detailed analysis suggests that the policy on arbitration is so strong that it might even be compulsory, at least in satisfying the conditions precedent to a Norris-LaGuardia injunction. This is certainly the plain holding of Brotherhood of Railway Trainmen v. Toledo, Peoria, and Western Railroad, 321 U.S. 50, 88 L.Ed. 534, and its rejection of the holding of this Court, Mayo v. Dean, 5 Cir., 82 F. 2d 554 (see Supreme Court discussion at 321 U.S. 61, 88 L.Ed. 541). The words of §108 (29 U.S.C.A. 108) are categorical that it is the policy of Congress that, "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or *voluntary arbitration*" shall be made. Inscribed so plainly and announced for such a length of time (since 1932), it seems unlikely to think that Congress must spell it out again.

See United Office and Professional Workers of America v. Monumental Life Ins. Co., E.D.Pa., 88 Fed.Supp. 602, 607.

[11] 29 U.S.C. 158 (a)(5). In NLRB v. Corsicana Cotton Mills, 5 Cir., 179 F. 2d 234, 235, a contempt proceeding for violation of cease and desist order, we exerted a supervisory administration of the collective bargaining

sue necessary coercive orders to effectuate it, to protect parties from charges of unfair labor practice[12] and deny reinstatement[13] to displace strikers where the strike is a breach of the agreement to arbitrate.

Arbitration is now the usual, almost universal mechanism to assure industrial peace during the life of the contract. Unlike its frequent use in commercial fields as a substitute for the costly delays and uncertainties of court litigation, the device is adopted in labor relations as a substitute for the economic pressures each can marshal in the strike or lockout, or the threat of either.[14] It

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process, one of the points in controversy being the arbitration clause. See NLRB v. American National Insurance Co., 343 U.S. 395, 407, 408, 96 L.Ed. 1027, 1038, 1039, requiring, but finding, good faith negotiation on the issue of a "management functions clause" versus "unlimited arbitration clause."

12 See Timken Roller Bearing Co. v. NLRB, 6 Cir., 161 F. 2d 949. Without invoking grievance machinery including arbitration for layoff of ten employees, union struck, employer refused further to entertain grievances and Board found employer guilty of unfair labor practice for failure to bargain; the court reverses holding that to require compliance with the contract including the agreement to submit to arbitration is the essence of collective bargaining in good faith; likewise, it held the union strike over a demand against subcontracting unlawful since the question whether subcontracting was or was not within the "management functions clause" was itself an arbitratable issue.

See also NLRB v. Standard Oil Co., 6 Cir., 196 F. 2d 892.

13 W. L. Mead, Inc., 113 LRB 109, 5 CCH Labor Law Reports (4th Edition), par. 53162, Labor Law Journal, October 1955, Vol. 6 No. 10, p. 721; 20 employees walked off the job, established a picket line to enforce demands concerning definition of duties and working hours of a truck driver after employer requested arbitration pursuant to arbitration clause in bargaining agreement. General Counsel brought complaint for refusal to rehire; Board reversed Trial Examiner and held employer could lawfully discharge the strikers. The Board stated: "* * * There can be no question but that in the case before us the grievance and arbitration clause * * * is a material provision of that agreement * * *. We find that [the contract] * * * excluded any other means but arbitration for the resolution of disputes, particularly unilateral action by any party * * *.

"Every encouragement should be given to the making and enforcement of such clauses. * * * To hold that a strike in furtherance of such a material breach of a clear and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Court of Appeals and the Supreme Court."

14 As perhaps unique proof of its unpartisanship arbitration has the rare distinction of being praised and feared by management and labor alike. Peter Seitz, a management representative, in The Enforcement of Collective Bargaining Contracts By Arbitration, New York University Sixth Annual Conference on Labor, 1953, p. 15, describes it: "The first fact to note is that arbitration is what I call a 'glandular' word. By that I mean that the mere articulation of the word causes thyroid and adrenal glands to secrete. Men-

would be incongruous indeed to find difficulty or even doubt, that a sovereign which can constitutionally compel the parties seriously in good faith to negotiate for an agreement to arbitrate, and punish and coerce them into compliance with it by administrative orders, sanctions or the denial of them with the added prestige of court approval by appellate review, will lack the power when its constitutional court is asked to grant a traditional remedy which will have the same end.

If I am mistaken that the network of federal labor legislation is the culture in which the Congressional policy of encouraging effective enforcement of arbitration can grow into a basis for an equity court granting an injunction, I would nonetheless reach the same result by using, for the first time, §301 in a modified sub-

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tion the term and calm men get bloodshot eyes; pulses throb and temperatures rise. This is specially interesting because the identical, violent, physical and emotional reactions will be observed in both management and labor representatives * * * [the] attitude toward arbitration is not unlike that of George Wither, the Restoration poet, who impatient with the conspicuous lack of affection demonstrated by his lady-love proclaimed:

"'If she be not so to me,
What care I how fair she be?'"

The widespread use commenced during the war days under the National War Labor Board and was stimulated later by the President's National Labor-Management Conference of 1945 attended by delegates representing AFL, CIO, Mine Workers, Railway Brotherhoods, United States Chamber of Commerce, National Association of Manufacturers which recommended final determination of grievances involving the interpretation or application of the collective bargaining agreement by an impartial chairman, arbitrator, or board, the decision of which should be final and binding on both, with specific machinery agreed to on the selection of the arbitrator (the agreement in this case tracks it closely). U. S. Department of Labor, Division of Labor Standards Bulletin No. 77, pp. 42 43, 1946. A study made by the Bureau of National Affairs, Inc., 1950, indicated that at least 80% of the collective bargaining agreements in the nation's important industries provided for arbitration as the terminal point of the grievance machinery. See, How Arbitration Works, Elkouric, 1952, The Bureau of National Affairs, Inc., pp. 6-10; Arbitration and Arbitration Provisions, J. Noble Braden, Tribunal Vice-President, American Arbitration Association, New York University Second Annual Conference on Labor, 1949, 355, 365. There has been a steady growth in percentage of agreements to arbitrate, from 73% in 1944 to 83% in 1949, Arbitration Provisions in Union Agreements in 1949, James Nix, Monthly Labor Review, February 1950, pp. 160-165, to approximately 91% in 1942, Arbitration Provisions in Collective Agreements, 1952, Ernestene M. Moore and James Nix, Monthly Labor Review, U. S. Department of Labor, Bureau of Labor Statistics, March 1953, pp. 261-266. The value of arbitration in the workaday handling of labor relations is attested by the practice of making formal, written arbitration reports which are indexed, digested and reported. See, Labor Arbitration Reports, The Bureau of National Affairs, Inc., approximately 21 volumes published.

stantive way. I do this since I believe that §301 is much more than a mere photoelectric cell to open wide the door as union-employer, *vis-a-vis*, approach. When a genuine *union* controversy, i.e., a 301 suit comes before it, the combinations of dissenting and concurring opinions in *Westinghouse* will, I believe, restore sufficient vitality to §301 to enable it to reflect federal policy itself and reach out comfortably, as the occasion may require, into state and federal concepts to fashion the controlling law. Whether this will be the creation of new federal rights or merely the release of its nascent powers, this reading of §301 would say to the district court that if there has been a breach of the collective bargaining agreement it shall exert whatever of its traditional weapons—the money judgment, the declaratory pronouncement, or the equity injunction —which will best assure contractual compliance.

Difficulties in forging a responsive jurisprudence neither indicate nor foretell a constitutional void, and it seems surprising at this late date that our flexible judicial apparatus, because of the likelihood of conflict with local law, should shrink from the necessity. The federal system has so well demonstrated its fluid capacity[15] that, applying its rule, doctrines frequently ignore, often reject, and frequently collide with local (state) principles[16] and, where

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[15] The federal courts have fashioned suitable federal principles in countless situations to effectuate multiple federal policies: Tort rules under Federal Employers Liability Act, Jesionowski v. Boston & M. R. R., 329 U.S. 452, 91 L.Ed. 416, Central Vermont Ry. Co. v. White, 238 U.S. 507, 59 L.Ed. 1433; The Jones Act, 46 U.S.C. 688, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L.Ed. 265; Laches in the enforcement of federal rights, Holmberg v. Armbrecht, 327 U.S. 392, 90 L.Ed. 743; Government contracts, Priebe & Sons v. United States, 332 U.S. 407, 92 L.Ed. 32, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 92 L.Ed. 10; Federal negotiable instruments and bonds, Clearfield Trust Co. v. United States, 318 U.S. 363, 87 L.Ed. 838, National Metropolitan Bank v. United States, 323 U.S. 454, 89 L.Ed. 383, Continental American Bank & Trust Co. v. United States, 5 Cir., 161 F 2d 935, D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 86 L.Ed. 956; Problems incident to National Banking System, Deitrick v. Greaney, 309 U.S. 190, 84 L.Ed. 694; Liabilities in performance interstate transportation contracts, O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F. 2d 539; and see Moore's Commentary on the United States Judicial Code, 1949, pp. 340-359, revealing, in detail, the development of a full body of law adequate to give life to federal policy.

[16] Spectacular illustrations are found in the field of federal taxation: Burnet v. Harmel, 287 U.S. 103, 77 L.Ed. 199, property status oil lease under local (Texas) law rejected; Burk—Waggner Oil Association v. Hopkins, 269 U.S. 110, 111, 114, 70 L.Ed. 183, 185, state law disregarded in determining

needed to effectuate Congressional will, the conflict and collision[17] may occur between two federal statutes or policies.

The agreement to arbitrate, for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which §301 sought to answer. If it is not available here, then nought[18] is left of §301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used.

The injunctive order to compel arbitration was right and should be affirmed.

I therefore respectfully dissent.

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status of group as partnership or corporation for income tax purposes; Lyeth v. Hoey, 305 U.S. 188, 83 L.Ed. 117, nature of interest under inheritance.

Similarly, state standards on existence of independent contractor relationship and the common law concept of direction and control, are frequently rejected: Rutherford Food Corp. v. McComb, 331 U.S. 722, United States v. Silk, 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, 715, 719; NLRB v. Hearst, 322 U.S. 111, 124-133.

[17] The same situation or circumstance frequently produces diverse results: e.g., direction and control of trucks, adequate to create genuine independent contractor relationship under Wage & Hour Law, and Social Security Law, United States v. Silk 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, is insufficient to make physical performance by owner-drivers of trucks "transportation" under National Transportation Act, 49 U.S.C. 301, United States v. Rosenblum Truck Lines, 315 U.S. 50, 86 L.Ed. 671 Thomson v. United States, 321 U.S. 19, 88 L.Ed. 513; a crew member of a non-self-propelled dredge is a "seaman" under the Jones Act, 46 U.S.C. 688, McKie v. Diamond Marine Co., 5 Cir., 204 F. 2d 132, but not a "seaman" under the Wage & Hour Act, Walling v. W. D. Haden Co., 5 Cir., 153 F. 2d 196, Cert. Den. 328 U.S. 866, 90 L.Ed. 1636; Towing of barges physically performed by chartered tug is not "transportation" by tug owner-operator under the Interstate Commerce Act, 49 U.S.C. 901, 909 (a), De Bardeleben Coal Corp. v. United States, W.D.Pa., 54 Fed.Supp. 643, affirming Union Barge Line Application, 250 I.C.C. 689, but is "transportation" for transportation tax under 26 U.S.C. 3475 (a), Gulf Coast Towing Co. v. United States, 5 Cir., 196 F. 2d 944.

[18] The court's action in International Ladies' Garment Workers, etc. v. Jay-Ann Co. No. 15,636, with this one, chipping away from §301, adds only to the uncertainty. The court finds no jurisdiction to enforce the agreement to make payments by employer to the union's welfare fund. I would disagree with it as well. That, too, seems to me to be a genuine *union* controversy, and finding no jurisdiction it is actually in conflict with the majority here.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 4980.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Plaintiff, Appellant,

v.

GENERAL ELECTRIC COMPANY,
(Telechron Department, Ashland, Massachusetts),
Defendant, Appellee.

Appeal from the United States District Court
for the District of Massachusetts.
[129 F. Supp. 665.]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

OPINION OF THE COURT

April 25, 1956.

MAGRUDER, *Chief Judge*. This case, together with two others also decided today, presents the question of whether a federal district court has authority, under §301 of the Labor Management Relations Act of 1947 (61 Stat. 156), to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such "employer and a labor organization representing employees in an industry affecting commerce."

Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the

Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

> "1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company . . ."

The Article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract . .m, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under §301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. §1291, from the final order of

April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

I

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters,* 217 F. 2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that §301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in §4 of the Norris-LaGuardia Act even in a case where such activities constitute a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in §4. However, consideration must also be given to §7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.* See also §§8 and 9. If it is not implicit

* "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been

in our discussion in the *Mead* case, *supra*, we now affirm that our determination there that enactment of §301 did not by implication repeal §4 of the Norris-LaGuardia Act applies as well to §7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F. 2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of §4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under §301 must also not "trench upon the interdictions of" §7, when that section and the Act of which it is a part are applicable according to their own terms.

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of §13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controversy between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, supra, 217 F. 2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Although

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given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court . . ." (47 Stat. 71-72).

the present controversy is a "labor dispute" within the scope of the Act as defined in §13, the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers of §7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction," for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies §2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which §7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd 173 F. 2d 567 (C.A. 2d, 1949); *Associated Telephone Co. Ltd.* v. *Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford* v. *Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills* v. *Textile Workers Union*, 230 F. 2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. §1292. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predecessors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. §1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also

Goodall-Sanford, Inc. v. *United Textile Workers,* No. 5029, decided today.

It is significant, while still at the verbal level, that within the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§4, 5, 7, 9, 10) or "injunctive relief" (§8). In contrast is §3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in §7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not worthy of comment. *Syres* v. *Oil Workers Union,* 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of §7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also §9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and

picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom; if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended §7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by §8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F. 2d 176 (C.A. 2d, 1955) and *Local 207* v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co.* v. *System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co. Ltd.* v. *Communication Workers*, supra; *International Longshoremen's Union* v. *Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F. 2d 225 (C.A. 9th, 1955). Nor does our conclusion rest on similar decisions granting relief, such as *Textile*

Workers Union v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, supra (§4 activity, as in the *Mead* case); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition, there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (C.A. 6th, 1950); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§1 *et seq.*), which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co.* 113 F. Supp. 137, 142 (D. Mass. 1953); cf. *Local 207* v. *Landers, Frary & Clark*, supra, 119 F. Supp. at 879; *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an order to compel arbitration is neither barred specifically by §4 nor subject to the requirements of §7, means that such an order could be granted against either party to a labor

dispute without violating the Act. The same is true of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike, however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, supra, 321 U.S. at 62-63; *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald* v. *Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

II

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this

question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under §301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that §301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a §301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if §301 created a "generally applicable and uniform federal substantive right," as well as "a remedy . . . and . . . a forum in which to enforce it," as the enactment was described in *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F. 2d 806, 809 (C.A. 2d 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a §301 case may have to determine at least some substantive issues by reference to state law—which possibly is so—then the problem of choice of law governing the "forms and mode" of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union* v. *American Thread Co.*, supra, 113 F. Supp. at 141-42, relying on "the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109 . . ."

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment

of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that "the remedy by arbitration . . . substantially affects the cause of action created by the State," 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided according to state law, as if the district court were "only another court of the State." In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under §301. As we explained in our second opinion in the *Mead* case, *supra,* decided March 6, 1956, jurisdiction in a §301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases "in Law and Equity, arising under . . . the Laws of the United States . . ."

Prior to the *Erie* decision, it was well accepted that the means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263, 277-79 (1943) (U.S. Arbitration Act). The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have emphasized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. *E.g.,* see *Guaranty Trust Co.* v. *York,* supra, 326 U.S. at 101; *Bernhardt* v. *Polygraphic Co.,* supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law, *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as

part of the "general maritime law" enforceable in admiralty, *Levinson* v. *Deupree*, 345 U.S. 648 (1953). See *Doucette* v. *Vincent*, 194 F. 2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a §301 case the *Erie*, *York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-Erie cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by §301 itself must be complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," *17 U. Chi. L. Rev. 233, 240-42* (1950). In Massachusetts, it is not at all clear what is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, §14, *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G.L. (Ter. Ed.) C. 150 §11, Magliozzi 1. *Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

III.

This brings us to the availability and appropriateness, as a federal equitable remedy in a §301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements

full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line* v. *Atlantic Fruit Co.*, supra, 264 U.S. at 120-23; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could overrule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that §301 itself is a legislative

authorization for decrees of specific performance of arbitration agreements. *E.g., Textile Workers Union* v. *American Thread Co.,* supra; *Wilson Bros.* v. *Textile Workers Union,* supra; *Local 207* v. *Landers, Frary & Clark,* supra; *The Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union* v. *Gillespie Milk Products Corp.,* supra. We think that is reading too much into the very general language of §301. The terms and legislative history of §301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting §301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case Judge Wyzanski deemed the U. S. Arbitration Act inapplicable, but no sooner had he ruled that §301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of §5 of the U. S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. Thus it seems to us that a firmer statutory basis than §301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

IV.

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in §1, provides that:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

If a suit is brought in a federal court, and the court "being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," §3 requires that it "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in §4 in these terms:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directly that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§6-8, 12-13. As already noted §5 provides a method for appointing an arbitrator, where necessary. Finally, §§9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that §2 defines the scope of §3, on a basis that implicitly reaches §4, as well. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under §4 is available only as to an arbitra-

tion agreement contained in the types of contracts defined by §2 as qualified by §1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of §2. For the Court ruled §2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01):

> "Nor does this contract evidence 'a transaction involving commerce' within the meaning of §2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to §2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of §2. Although it does not consummate the employment relationship, which may be the "transaction," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of §2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Arbitration Act," 17 Law & Contempt. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part thereof," as provided in §2 of the Arbitration Act. See *Metal Polishers Union* v. *Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement . . ."

Section 2, however, must be read in connection with §1, which after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

> "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of §1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co.* v. *NLRB*, supra, 321 U. S. at 334-35:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment.*" [Italics added.]

Compare the language used in §3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee : . ." (47 Stat. 70) But see *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310, 313 (C.A. 3d 1951), 65 Harv. L. Rev. 1239

(1952). See also Cox, "Grievance Arbitration in the Federal Courts" supra, 67 Harv. L. Rev. at 595-97.

If the words of §1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc.* v. *United Electrical orkers,* 207 F. 2d 450, 452 (C.A. 3d, 1953), with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. §651), we cannot attribute much force to it against a reading of the statutory language itself.

Court decisions are divided on the breadth of the exclusion in §1 of the U.S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.,* 192 F. 2d 310 (C.A. 3d, 1951); *United Electrical Workers* v. *Miller Metal Products, Inc.,* 215 F. 2d 221 (C.A. 4th, 1954); *Lincoln Mills* v. *Textile Workers Union,* 230 F. 2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co.* v. *Oil Workers Union,* 187 F. 2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union,* 182 F. 2d 806, 809 (C.A. 2d, 1950). But cf. *Markel Electric Products, Inc.* v. *United Electrical Workers,* 202 F. 2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its

view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc.* v. *United Electrical Workers,* 207 F. 2d 459 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under §3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc.* v. *Teamsters Union,* 217 F. 2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons* v. *United Furniture Workers,* 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers* v. *Oliver Corp.,* 205 F. 2d 376, 385 (C.A. 8th, 1953); *Wilson Bros.* v. *Textile Workers Union,* supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc.* v. *United Electrical Workers,* supra, 207 F. 2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, *supra,* 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statutory provision as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so

varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico* v. *The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in §1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment," and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of §4 which authorizes specific enforcement of an agreement to arbitrate by a district court "which, *save for such agreement*, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties . . ." [Italics added.] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under §301 to adjudicate directly between union and employer a controversy over "terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of §4, to compel arbitration of that dispute. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from §301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from the individual contract between the employer and employee." 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union

can effectively seek redress, and for whose breach §301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under §301 shows that if cases seeking to compel an employer to arbitrate were thrown into the discard along with *Westinghouse*-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of §301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of §4 will be satisfied by a complaint which meets the terms of §301 itself. Cf. *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 166.

V.

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, *e.g.*, *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co., Inc.*, 168 F. 2d 33 (C.A. 4th, 1948); *Markel*

Electric Products, Inc. v. *United Electrical Workers,* supra (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, *e.g., Wilson Bros.* v. *Textile Workers Union,* supra, 132 F. Supp. at 164-65; *Insurance Agents' Union* v. *Prudential Ins. Co.,* 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§10-11 of the Act. See, *e.g., Local 379* v. *Jacobs Mfg. Co.,* 120 F. Supp. 228 (D. Conn. 1953). See also *Goodall-Sanford, Inc.* v. *United Textile Workers,* No. 5029, decided today.

VI.

Plaintiff has submitted a motion to this court, under 28 U.S.C. §1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue* v. *Kenney,* 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp.* v. *Local 259,* 63 F. Supp. 411, 413 (D. Mass. 1945).

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.